GOVERNMENT OF ANDHRA PRADESH

ABSTRACT

Infrastructure & Investment Department – Andhra Pradesh Maritime Board – Kakinada Gateway Port Limited (KGPL) – Change in shareholding pattern in Kakinada Gateway Port Limited (KGPL) due to acquisition of 99.74 % of shares by M/s. Aurobindo Realty and Infrastructure Private Limited (ARIPL) in KSEZ – Orders – Issued.

INFRASTRUCTURE & INVESTMENT (PORTS) DEPARTMENT

G.O.MS.No. 3 Dated: 10-03-2021.

Read the following:

1. G.O.Ms.No.10, I&I, (Ports-I) Department., dated 3-12-2007
2. G.O.Ms.No.14, E,I&I, (Ports-I) Department., dated 27-11-2015
3. G.O.Ms.No.24, E,I&I, (Ports-I) Department., dated 01-07-2016
4. G.O.Ms.No.20, I&I, (Ports-I) Department., dated 20-09-2017
5. G.O.Ms.No.20, E, I&I, (Ports-II) Department., dated 26-6-2018
6. Concession agreement dated 21-11-2018
7. G.O.Ms.No.15, I&I Dept dt.13-3-2020.
8. G.O.Ms.No.17, I&I, (Ports-I) Department., dated 24-12-2020
9. From Aurobindo Realty & Infrastructure Pvt Ltd., Lr dt: 11-01-2021
10. From Kakinada Gateway Port Ltd., Letter dt 12-01-2021.
11. Letter of CEO, APMB, No.98/APMB/2020., dated:21-01-2021 address to Mr. Justice V.N. Khareji, former CJ of India, Noida.
12. Opinion received from Mr. Justice V.N. Khareji, former CJ of India, Noida, Dated.23-01-2021
13. From the Chief Executive Officer, AP Maritime Board Letter Dt: 27-01-2021
14. Govt. Letter No.INI01-PORT/99/2020, dated 28.12.2020 & 29.01.2021
15. From the Advocate General, AP Lr.OPINION No.7, dated 12.02.2021

O R D E R:

In the reference 1st read above, Orders were issued declaring Kona as Captive Port to handle only KSEZ Cargo in Kakinada Special Economic Zone area. Subsequently, in the reference 2nd to 4th read above, the said Port was considered for development into a commercial port through PPP Mode in accordance with the terms of APIDE Act, 2001 read with Port Policy of 2015 through Swiss challenge approach. In the reference 5th read above, Government have approved to accept the 2.70% of the Revenue Share on the Gross Revenue from Commercial Operations Date (COD) offered by the Original Project Proponent (OPP) i.e. M/s.Kakinada SEZ Limited and declares the selected Bidder in terms of clause 3.3.5 of the RFP document and Award of the Concession to the OPP i.e. M/s.Kakinada SEZ Limited and Letter of Award issued in favour of M/s. Kakinada SEZ Ltd., – vide Lr. No.SE/PP2/3501/2011, dated 05-10-2018. Thereafter an Concession Agreement has also been entered into on 21-11-2018 with M/s. KGPL (SPV incorporated by M/s. KSEZ Ltd., for the purpose of undertaking the development including entering into Agreement).

2. M/s. KGPL have sought for extension of time for financial closure and Government have accorded extension by 12 months from the cut of date i.e., till 20th November, 2020 in the G.O. 6th read above. Again, the concessionaire stating that most of the conditions were complied with by them and certain obligations cast upon the authority are still to be granted and also quoting COVID-19 requested for further extension of time for final closure by another one year i.e., upto 20th November, 2021 and AP Maritime Board has granted 6 months extension of time in accordance with the general orders issued by the Government of India, on account of COVID 19.

3. In the meanwhile, KSEZ and Aurobindo Reality Infrastructure Pvt. Ltd., (ARIPL) have submitted representation informing the proposed acquisition of 99.74% of equity in KSEZ by Aurobindo Realty Infrastructure Pvt. Ltd., and the proposal to limit the equity of KSEZ in KGPL to 74 % and allow the GMR SEZ and Port Holdings Ltd., to acquire 26 % in order to satisfy clauses 5.13.1 and 5.13.2 of the Concession Agreement.

4. They have submitted that ARIPL has committed to develop the Port immediately and they have indicated that they have necessary where withal to take up the Port Project and is competent to execute the Project without further lapse of time. They would invest an amount Rs.3,500 crores against the original investment proposal of Rs. 2123 crores of KSEZ Ltd., to handle about 16 million tones in the first phase with direct and indirect employment of 3,500 people in the next 5 years. M/s. ARIPL projected development in the high order with the proposal of developing Petro Chemical Park and Pharma Park with high investment running into thousands of crores and generating huge employment.

5. While so, the Board of Approvals under the Ministry of Commerce, Government of India have approved acquisition of 99.74% of share by M/s. Aurobindo Realty & Infrastructure Pvt. Ltd., (ARIPL) in Kakinada SEZ Limited.

6. In the reference 8th read above, ARIPL was permitted to acquire 41% of equity in the Kakinada Sea Ports Ltd.,(KSPL). Due to this acquisition, M/s ARIPL has sought exemption of clause 5.9 of the Concession Agreement, which lays down an embargo to acquire control or interest in the operations or services of any other port situated within a distance of 75 kilometers from the Port such that its share exceeds 25 % of such control or interest in the operations or services of that Port and also to ensure and procure that no person who controls or operates any other port situated within a distance of 75 kilometers from the port shall acquire control or interest in the operations or services of the Port such that the share of such person exceeds 25 % of such control or interest in the operations or services of the Port.

7. The matter has been examined in consultation with former Chief Justice of India Mr. Justice V.N. Khare, by the Chief Executive Officer, AP Maritime Board and submitted proposals, who opined that the restriction laid down under clause 5.9 is not an absolute restriction and is subject to waiver by the Authority. This can be derived from the proviso which has been specifically carved out under Clause 5.9 of the Concession Agreement stipulating that the restrictions under Clause 5.9 of the Concession Agreement will not be applicable

in case of any direction and decisions made by the Authority. Accordingly, it would be well within its right to waive the restriction envisaged under Clause 5.9 so long as such action of the Authority is based on bona fide rationale exists. An action of the authority in modifying / amending / waiving the concession agreement would be entirely consistent with the extent of legal requirements and the constitutional mandate. Further, every activity of governmental authority must be informed by reason and guided by the public interest. All exercises of discretion of power by public authority are to be judged by that stand. The proposed development of the port-based multi-product park contemplated by ARIPL under the proposed acquisition of Kakinada SEZ will not only offer value proposition to that region but also give a big boost to ancillary sectors creating huge employment opportunities, which fact cannot be disregarded and these are important and highly relevant considerations which would form a basis for considering the request of the applicant favourably.

8. Government have also referred the matter to the learned Advocate General who opined that in terms of Clause 47.10 of the Concession Agreement, it would be able to revisit and consider the request for deletion/amendment of Clause 5.9. Since the Concession Agreement govern public work of huge public interest and economic importance in the fulfilment of the objectives of the agreement and the successful completion of the project, such concerns of public interest can form rationale basis for seeking recourse to the mutual right under Clause 47.10 to amend the agreement accordingly, to enable consideration of the request of the Company.

9. Keeping in view of the above, Government after careful examination of the matter have decided to take note of the fact of the approval accorded by the Board of approvals of Ministry of Commerce to M/s. Aurobindo Realty & Infrastructure Pvt. Ltd. (ARIPL) acquiring 99.74% of share in Kakinada SEZ Limited and agree to waive the clause 5.9 of the concession agreement dated 21-11-2018 to enable M/s. ARIPL acquiring equity shares approximately 74% indirectly in KGPL invoking the powers conferred under proviso, while GMR SEZ and Port Holdings Limited owning 26% on equity in terms of Clause 5.13.1 of the Concession Agreement and consequently the proposed change in shareholding pattern in KGPL.

10. Accordingly, Government hereby approve the following:

(a) taken note of the acquisition of 99.74% of share by M/s. Aurobindo Realty & Infrastructure Pvt. Ltd. (ARIPL) in Kakinada SEZ Limited as approved by Board of Approvals of Ministry of Commerce, Government of India;

(b) permitted GMR SEZ and Port Holdings Ltd., to acquire 26% of equity from Kakinada SEZ and hold in Kakinada Gateway Port Limited (KGPL) in terms of Clause 5.13.1 of the Concession Agreement and approve the change in the following shareholding pattern in Kakinada Gateway Port Limited:

Sl. No.	*Name of the Shareholder*	*Shareholding percentage*	
		EXISTING	*APPROVED*
1	Kakinada SEZ Ltd.	100.00%	74.00%
2	GMR SEZ & Port Holdings Limited (GSPHL)	0.00%	26.00%
TOTAL SHAREHOLDING		100.00%	100.00%

(c) exempt M/s. Aurobindo Realty & Infrastructure Pvt. Ltd., (ARIPL), which entity is holding 41.12% share in Kakinada Sea Ports Limited (KSPL) and which is now, as a shareholder in KSEZ, proposed to hold 74% in Kakinada Gateway Port Limited (KGPL), which is the direct consequence of acquisition of 99.74% of shares in Kakinada SEZ, under proviso of Clause 5.9 of Concession Agreement, with a condition that the targets towards investment and employment proposed by M/s. Aurobindo Realty & Infrastructure Pvt. Ltd., (ARIPL) should be achieved, failing which the authority is at liberty to take necessary action, by entering into a supplementary agreement to that effect.

11. The Chief Executive Officer, APMB shall take all necessary further action in the matter accordingly.

12. This order issues with the concurrence of Finance Department, vide their U.O.No. FIN01-FMU0ASD/263/2020, dated 08.03.2021.

(BY ORDER AND IN THE NAME OF THE GOVERNOR OF ANDHRA PRADESH)

R. KARIKAL VALAVEN
SPECIAL CHIEF SECRETARY TO GOVERNMENT

To
The Chief Executive Officer, APMB, Kakinada.
M/s. Kakinada SEZ Ltd., through CEO, APMB, Kakinada
M/s. Aurobindo Realty & Infrastructure Pvt. Ltd., through CEO, APMB, Kakinada
The Port Officer, Kakinada
Copy to:
The OSD to Secretary to Hon'ble CM
The OSD to Hon'ble M(I&I)
The Finance (Exp.FMU-IIEIC) Department
The GA(Cabinet) Dept.,
The V.C&MD, APIIC.
The PS to Spl.C.S., I&I Department.
Sf/sc(INI01-PORT/99/2020)

//FORWARDED :: BY ORDER//

SECTION OFFICER